Filed 10/30/20 Marriage of Whitt CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sierra)

In re the Marriage of KATHERINE M. and TRAVIS WHITT.	C090127
KATHERINE BRADLEY, Appellant, v. TRAVIS WHITT, Respondent.	(Super. Ct. No. 7420)

Katherine Bradley, formerly Katherine M. Whitt (mother), appeals from an order modifying the amount of child support paid by Travis Whitt (father). She contends the trial court abused its discretion and exceeded its jurisdiction by retroactively modifying support and failing to charge father interest on child support arrearages. These claims lack merit.

Mother further contends that the trial court abused its discretion in deviating from the guideline child support amount and including discretionary add-ons to the guideline amount, further reducing the amount of child support owed. On this record, we find no abuse of discretion.

Finally, mother contends the trial court erred in failing to make the specific findings required to support a deviation from the guideline child support amount. Finding merit in this claim, we reverse the trial court's order on this ground alone and remand for further proceedings.

I

BACKGROUND

Following a hearing on October 30, 2015, the trial court ordered father to pay mother $1,602 per month for child support and ordered the parties to share equally in any unreimbursed health care costs for their minor child. The court continued the matter to December 7, 2015, for, among other things, a review of child support and custody, as well as a temporary parenting plan.

After the December 7, 2015 hearing, the trial court ordered the parties, on January 7, 2016, to share joint legal custody of their minor child and issued a temporary parenting plan pending completion of a custody evaluation. The court also modified the October 30, 2015 order for support, including an order that child support would decrease to $1,477 per month beginning January 1, 2016. The court reserved jurisdiction over child support "until March 1, 2016 to retroactively modify this decrease" in the event father's pay was not reduced as anticipated. The court set the matter for a status conference on February 1, 2016.

On November 28, 2016, father filed a request for temporary emergency orders on, among other things, custody, child support, and visitation (parenting time). Father wanted sole legal and physical custody of the parties' minor child, as well as a modification of the order for child support filed on December 16, 2015.

On November 30, 2016, the parties reached agreement on numerous disputed issues. As part of their agreement, mother agreed to drop her request for a domestic violence restraining order without prejudice, and father agreed to drop his November 28, 2016 request for orders without prejudice. These agreements were subsequently memorialized in a court order filed on December 22, 2016. The court noted the issue of custody remained in dispute.

On July 24, 2017, the parties (both of whom were represented by counsel) executed a stipulation and order, wherein the parties agreed to share joint legal and physical custody of their child and agreed to a detailed parenting plan. The parties also agreed, and the court ordered, that father's increased parenting time "constitute[d] a material change of circumstances warranting the review of temporary child support and [that they would] meet and confer to try to resolve modifications to support. The court reserve[d] jurisdiction to modify support effective May 1, 2017."

On December 18, 2017, following a three-day trial in November 2017, the trial court issued a "tentative statement of decision regarding custody and visitation." In that decision, the trial court ordered supervised exchanges of the minor child and ordered the parties to "equally share in the cost of the exchange supervision." The court also ordered the child to continue in counseling and ordered the parties to "equally share any out of pocket cost of the therapy." The "frequency, duration and configuration" of the child's therapy would be determined by the therapist.

The court concluded its tentative decision by saying that if no timely objection were filed, the tentative decision would become the court's "Final Statement of Decision." No objection was filed and on March 26, 2018, judgment was entered with the terms of the final statement of decision attached reflecting only minor changes.

On July 12, 2018, the parties appeared before the trial court for a "review hearing" following the court's receipt of the custody evaluation report. Having considered that report, and finding it supported by evidence, the court ordered the child to remain

primarily in father's care once school began. The court continued the matter for an evidentiary hearing on August 30, 2018, to allow mother to contest the findings and recommendations contained within the report. At that time, the court also would consider father's request for attorney fees.

After the August 30, 2018 evidentiary hearing, the trial court issued a "proposed statement of decision re custody, attorney's fees and sanctions" on November 13, 2018. Within that proposed statement of decision was the parties' stipulation and the court's order that "the issue of reallocation of costs related to payment of custody evaluations and supervision of visitation is reserved." The court ordered the supervised parenting exchanges to continue, and the parties each to "pay one-half of the costs related to exchanges." The court also ordered the parties to "equally share any out of pocket cost of the [child's] therapy," but reserved the right to reallocate those expenses at a later hearing in February 2019.

Regarding child support, the court indicated its hope that counsel would be able to resolve the issue. The court, however, also reserved jurisdiction to modify child support "retroactive to the date of any request filed by a party which has not yet been ruled upon only through and including February 7, 2019." That proposed statement of decision became the order of the court on February 14, 2019.

On February 6, 2019, father filed a current income and expense declaration with the court. Mother filed a current income and expense declaration on February 28, 2019. In her declaration, mother indicated she paid $500 a month for rent and owed her mother Judith Bradley over $188,000 for "personal loan[s]," which she used to pay her attorneys. Mother also indicated her monthly expenses total $2,410 each month, some of which was "paid by others," though that amount "varie[d]." She reported her monthly income to be $77 a week.

Before the hearing on March 7, 2019, father submitted to the court a revised DissoMaster. At the March 7, 2019 hearing, however, the court ordered the parties each

to submit proposed DissoMaster calculations "for 05/01/2017 to current and include any claims of arrears and any other filings prior to 03/25/2019." The court also ordered father to pay $2,500 in need-based attorney fees directly to mother's attorney, but the court reserved jurisdiction "to reallocate at a later time."

Mother filed another request for order on March 22, 2019. In her request, mother sought orders for sanctions, custody modification, and issues related to the minor child's therapy.

On March 25, 2019, father filed proposed DissoMaster calculations "for the time period May 1, 2017 through July 31, 2018 and August 1, 2018 through the present date." Attached to his proposed calculations were father's paystubs for February through March 2017, as well as his W-2 for 2016.

The parties appeared before the court on March 26, 2019, "for continued hearing on modification of reserved support," and each were "administered the oath."

The court subsequently issued its findings and order after hearing on April 25, 2019. The court found that in the July 24, 2017 stipulation and order, it reserved jurisdiction to modify child support retroactive to May 1, 2017. The court adopted the parties' stipulation that between May 1, 2017, and the date of the hearing, father paid to mother $7,933.80 in child support.

The court ordered guideline child support for the time period between May 1, 2017, and December 1, 2017, to be $974 per month. The court then deviated from the guideline amount, reducing child support to $745 per month for that time period, "taking into consideration [mother's] housing circumstances and [found that] deviation is in the best interest of the child."

For the time period between January 1, 2018, and July 31, 2018, the court found guideline child support to be $1,206 per month. Taking into consideration mother's housing circumstances, which were disputed, the court again deviated from the guideline amount, reducing child support to $900 per month for that period. The court found this

amount to be in the child's best interests. The court then ordered child support be reduced to zero, effective August 1, 2018.

In sum, the court found "the net child support due to [mother] for the period of May 1, 2017 through the present is $4,326.20. No interest is due on this amount." As "child support add-ons," the court ordered mother to reimburse father $1,500 for her share of the supervised exchange expenses, and $500 for her share of out-of-pocket therapy costs. The court ordered those amounts to be deducted "from the amount of outstanding child support owed." Father thus owed mother a total of $2,326.20, to be paid "within 45 days from the date of hearing."

Mother appeals from this order.

II

DISCUSSION

A. *Standard of review*

"First, child support awards are reviewed for abuse of discretion. [Citations.] We observe, however, that the trial court has 'a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . .' [Citation.] Furthermore, 'in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]' [Citation.] In short, the trial court's discretion is not so broad that it 'may ignore or contravene the purposes of the law regarding . . . child support. [Citations.]' [Citation.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283, superseded by statute on another matter as stated in *In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1049; *Y.R. v. A.F.* (2017) 9 Cal.App.5th 974, 982-983 (*Y.R.*).)

Mother, however, appeals without supplying a reporter's transcript or settled statement of the hearing culminating in father's reduced child support obligation. This is called a judgment roll appeal.

In a judgment roll appeal with only a clerk's transcript we " 'must conclusively presume that the evidence is ample to sustain the [trial court]'s findings.' " (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154 (*Ehrler*).) Our review is limited to determining whether any error appears on the face of the record. "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record." (Cal. Rules of Court, rule 8.163.)

B. *Jurisdiction to modify child support*

Mother contends the trial court "exceeded its jurisdiction" by modifying child support without a motion pending. Specifically, she contends the trial court exceeded its jurisdiction in July 2017, when the court reserved jurisdiction to modify child support retroactive to May 1, 2017. She contends the trial court exceeded its jurisdiction again at the March 26, 2019 hearing by modifying child support without a motion pending. We are not persuaded.

Modification of a temporary support order "*ordinarily* requires a noticed motion or an OSC." (*In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 640, italics added.) In July 2017, the parties (represented by counsel) executed a stipulation and order with the court in which the parties stipulated to a review of child support based on a material change of circumstances. The parties also agreed the court would reserve jurisdiction to modify child support retroactive to May 1, 2017. Mother offers no legal authority or cogent argument for why these stipulations did not place the issue of child support squarely within the court's jurisdiction in July 2017, where it remained until March 26, 2019, when the court finally resolved the issue.

Moreover, to the extent the court did err in executing the July 2017 stipulation and order and issuing the April 25, 2019 order for child support, without a motion pending, mother invited the error by executing the July 2017 stipulation and order leaving the issue open before the court. "It is settled that where a party by his [or her] conduct induces the

commission of an error, under the doctrine of invited error he [or she] is estopped from asserting the alleged error as grounds for reversal. [Citations.] Similarly, an appellant waives his [or her] right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal. [Citations.]" (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.)

C. *Deviation from guideline child support*

Mother contends there was insufficient evidence to support the trial court's decision to deviate downward from the guideline child support amount. She further contends the trial court abused its discretion by failing to make the statutory findings required to deviate from the guideline child support amount. Without a reporter's transcript, mother's claim regarding the sufficiency of evidence is foreclosed. Her claim the court failed to make the required statutory findings in support of its decision, however, has merit.

1. *Sufficiency of the evidence*

Mother asserts there was insufficient evidence before the trial court to deviate downward from the guideline amount of child support. Whether there was sufficient evidence to support the trial court's finding is a question that is foreclosed on a judgment roll appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082.) Without a reporter's transcript, we must presume there was sufficient evidence to support the trial court's finding. (*Ehrler, supra*, 126 Cal.App.3d at p. 154.) Mother's contention regarding the sufficiency of the evidence thus fails.

2. *Required statutory findings*

Mother contends the trial court erred in failing to make the required statutory findings to support its decision to deviate downward from the guideline amount of child support. We agree.

Family Code section 4056, subdivision (a)(2)[1] requires the trial court to provide reasons why the award deviates from the guideline amount. Under section 4056, subdivision (a)(3), the court also must explain why an amount below the guideline is in the best interests of the child. (*Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450 (*Rojas*); *Y.R., supra*, 9 Cal.App.5th at p. 985.) The statement of reasons is mandatory; trial courts must "render the specified information sua sponte when deviating from the guideline formula." (*Rojas*, at p. 1450, fn. omitted; *Y.R.*, at pp. 984-985.) Section 4056 requires the court to do "more than issue conclusory findings; it must articulate why it believes the guideline amount exceeded the child's needs and why the deviation is in the child's best interests." (*Y.R.*, at p. 985, fn. 16; *McGinley v. Herman* (1996) 50 Cal.App.4th 936, 945 ["conclusionary finding falls far short of providing *reasons* why the level of support that the trial court awarded is consistent with the child's interests"].)

Here, for the period of May 1, 2017, through December 1, 2017, the trial court's explanation for why the child support deviates from the guideline amount was a single sentence: "The Court makes a downward deviation to $745.00 per month taking into consideration [mother's] housing circumstances and finds deviation is in the best interest of the child." The court offered the same perfunctory explanation for the period from January 1, 2018, through July 31, 2018.

These conclusory findings do not provide reasons why a reduction from the guideline amount is justified and consistent with the minor child's best interests. (*McGinley v. Herman, supra*, 50 Cal.App.4th at p. 945; *Y.R., supra*, 9 Cal.App.5th at p. 985, fn. 16.) There are no specific facts or findings cited as to what mother's housing circumstances are or how a deviation from the guideline amount given those circumstances is in the child's best interests. (See *Y.R.*, at p. 985, fn. 16; see also *Rojas*,

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[1] Undesignated statutory references are to the Family Code.

supra, 50 Cal.App.4th at pp. 1450-1451.)[2] We thus have no way of knowing whether appropriate consideration was given to whether the guideline result should be varied under the circumstances of this case. (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 319-320.)

We conclude that the trial court's child support order must be reversed and remanded to allow the trial court to make the required findings. And, while we must reverse and remand this matter for the required information under section 4056, subdivision (a), we are not suggesting the support order is otherwise defective or unsupported by substantial evidence. (See, e.g., § 4057, subd. (b)(1).)

D. *Retroactive modification of child support*

Mother asserts the trial court "exceeded its jurisdiction" in the April 25, 2019 order by retroactively modifying "child support arrearages." We disagree.

"[A] trial court lacks jurisdiction to retroactively modify a temporary support order to any date earlier than the date on which a proper pleading seeking modification of such order is filed [citation], unless the trial court expressly reserves jurisdiction to amend the support order such that the parties' clear expectation is the original support award is not final." (*In re Marriage of Spector* (2018) 24 Cal.App.5th 201, 210.)

As discussed previously, in the July 24, 2017 stipulation and order, the trial court expressly reserved jurisdiction to modify child support retroactive to May 1, 2017, with the parties' mutual consent. As a result, the January 7, 2016 order for child support, the operative order in July 2017, was "not fully dispositive of the rights of the parties with respect to the amount of support to be awarded . . . , and therefore did not constitute [a] final support order[ ]" as to the time period from May 1, 2017, to the final hearing on

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[2] " 'Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion. [Citation.]' [Citations.]" (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 239.)

child support on March 26, 2019. (*In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1074-1075.) Therefore, the trial court's April 25, 2019 order modifying child support retroactive to May 1, 2017, was within its jurisdiction.

E. *Statutory interest*

Mother also contends the trial court erred by failing to "order the statutorily required interest for child support arrearages." We disagree.

Section 4722 provides: "(a) Any person with a court order for child support, the payments on which are more than 30 days in arrears, may file and then serve a notice of delinquency, as described in this chapter.

"(b) Except as provided in Section 4726, and subject to Section 4727, any amount of child support *specified in a notice of delinquency that remains unpaid for more than 30 days after the notice of delinquency has been filed and served* shall incur a penalty of 6 percent of the delinquent payment for each month that it remains unpaid, up to a maximum of 72 percent of the unpaid balance due." (§ 4722, italics added; see also *In re Marriage of Hubner* (2004) 124 Cal.App.4th 1082, 1087-1088 [father served with notice of delinquency, statutory interest accrued].)

According to the clear language of the statute, without a notice of delinquency, statutory interest will not accrue. There is no evidence in the record that mother ever filed and served father with a notice of delinquency regarding unpaid child support. As a result, the trial court correctly did not impose interest on the amount of child support owed.

F. *Discretionary add-ons to guideline child support*

Mother asserts the trial court either exceeded its jurisdiction or abused its discretion (she argues both) when it ordered her to reimburse father for " 'her share' " of supervised exchange costs and the child's counseling, and categorized those expenses as child support "add-ons." She also asserts there was insufficient evidence to support father's claimed expenses. Each of her claims lack merit.

First, any contention that there was insufficient evidence to support the amount father paid for the child's counseling and supervised exchanges fails on this record. (*Allen v. Toten, supra,* 172 Cal.App.3d at p. 1082.) Without a reporter's transcript, we must presume there was sufficient evidence to support the trial court's finding. (*Ehrler, supra,* 126 Cal.App.3d at p. 154.)

Second, "[s]ection 4062 'makes discretionary ("the court may order") additional child support for educational or special needs of a child or for travel expenses for visitation. Among the family law bench and bar, these are usually referred to as . . . discretionary add-ons.' [Citation.] 'The amounts in Section 4062, if ordered to be paid, shall be considered additional support for the child[ ] and shall be computed in accordance with the following: [¶] (a) If there needs to be an apportionment of expenses pursuant to Section 4062, the expenses shall be divided one-half to each parent, unless either parent requests a different apportionment pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate.' " (*In re Marriage of Schlafly* (2007) 149 Cal.App.4th 747, 760, italics omitted.)

Here, the trial court ordered supervised exchanges of the minor child, along with counseling (the frequency and manner of which were to be set by the child's counselor). Mother cites no authority, and makes no cogent argument, to support her position that a child's need for supervised exchanges and counseling do not qualify as a "special need," the cost of which fall within the court's broad discretion to include as discretionary add-ons to guideline child support. Indeed, we conclude they fall squarely within that discretion. (See, e.g., *In re Marriage of Schlafly, supra,* 149 Cal.App.4th at pp. 760-761 [extracurricular activities fall within court's broad discretion to include as an educational need].)

DISPOSITION

The order is reversed and remanded in accordance with this opinion with directions that the trial court comply with section 4056, subdivision (a). The parties to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

KRAUSE, J.

We concur:

RAYE, P. J.

BLEASE, J.